



Case Number:	Environment and Land Case 111 of 2011
Date Delivered:	27 Mar 2019
Case Class:	Civil
Court:	Employment and Labour Relations Court at Bungoma
Case Action:	Judgment
Judge:	Boaz Nathan Olao
Citation:	Getrude Elung'ata (suing as legal representative of the Estate of the Late Patroba Omoding Ikwara (Deceased) v Godfrey Emuria Emase & another [2019] eKLR
Advocates:	Ms Natwati for the Plaintiff Mr. Wekesa for Ms Chunge for the Defendant
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Bungoma
Docket Number:	-
History Docket Number:	-
Case Outcome:	Judgment entered for the Plaintiff against the 2nd Defendant. Claim against the 1st Defendant dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 111 OF 2011.

**GETRUDE ELUNG'ATA (Suing as legal representative of the Estate
of the late PATROBA OMODING IKWARA (DECEASED)).....PLAINTIFF**

VERSUS

1. GODFREY EMURIA EMASE.....1ST DEFENDANT

2. BOAZ ETYANG EDWACHI.....2ND DEFENDANT

J U D G M E N T

In keeping with the **Provisions of Article 159(2) (c) of the constitution**, I have always encouraged families to resolve their land dispute outside the Courts. Sometimes I succeed but at other times I don't. In this case I did not succeed notwithstanding my spirited efforts to do so even after the parties had closed their respective cases. I must therefore do what is required of me and leave the un-pleasant consequences to the parties themselves to deal with.

The parties herein are related and their dispute is with regards to the ownership of the land parcel **NO BUNGOMA/KABISI/220** (hereafter the suit land). According to the Green Card, the suit land was first registered under the Settlement Fund Trustee on 22nd March 1983 before it was registered in the names of **NYABIDI SEMEKI** (also referred to as **ONYAPIDI ISEMEKI**) on 2nd October 1986. For purposes of this judgment, I shall simply refer to him as **ONYAPIDI**. According to the Certificate of Official Search, there was a charge registered on the suit land in favour of the Settlement Fund Trustee to secure a sum of Kshs. 4,300/= at the rate of 6½% from 1st September 1963. This was discharged on 15th January 1993 as per the discharge of charge. At the time of filing this suit, the suit land was registered in the names of the 2nd defendant **BOAZ ETYANG EDWACHI** who obtained the title deed thereto on 22nd September 2011 but holds it in trust for himself and other beneficiaries including the 1st defendant **GODFREY EMURIA EMASE**.

The plaintiff herein **GETRUDE KUNGATA** is the wife of the late **PATROBA OMODING IKWARA (PATROBA)** and filed this Originating Summons on 7th November 2011 as his legal representative citing the relevant provisions of the Limitation of Action Act and seeking the main prayer that she is entitled to six (6) acres out of the suit land having obtained the title thereto through adverse possession having lived thereon with her late husband since 20th September 1974 until his death on 20th October 1999. She therefore sought orders that **ONYAPIDI'S** title to the suit land has been extinguished following her occupation for over twelve (12) years and that six (6) acres of the same should be registered in her names.

Annexed to the Originating Summons was the supporting affidavit dated 4th November 2011 and also the following documents:-

1. Copy of the Marriage Certificate between the plaintiff and PATROBA.
2. Copy of PATROBA'S Death Certificate.
3. Copy of the sale agreement between PATROBA and ONYAPIDI dated 31st May 1981 in respect of purchase of five (5) acres of land (the original sale agreement was produced during the trial).
4. Copy of the Limited Grant issued to the plaintiff in BUNGOMA P & A CAUSE NO 360 OF 2011 in respect to PATROBA'S Estate.
5. Certificate of Search in respect to the suit land dated 28th September 2010 and showing a charge in favour of the Settlement Fund to secure a sum of Kshs. 4,300/= at the interest rate of 6½% on 1st September 1963.
6. Copy of the Green Card to the suit land.
7. Copy of the Grant of Letter of Administration issued to the 1st defendant in BUNGOMA P & A CAUSE NO. 97 OF 2000 in respect to the Estate of ONYAPIDI.
8. Copy of the Confirmation of the Grant issued to the 1st defendant and confirming that the 2nd defendant was to be registered as proprietor of the suit land in trust for the 1st defendant and COLLINS ATHER IKWARA.
9. Copy of letter dated 16th February 1993 from the District Land Adjudication and Settlement Officer addressed to ONYAPIDI and copied to PATROBA confirming that the discharge of charge and transfer Certificate in respect to the suit land was ready for collection.
10. Copy of a letter dated 21st December 2000 indicating that apart from the five (5) acres that ONYAPIDI had sold to PATROBA, the family of ONYAPIDI had agreed to add PATROBA 1 extra acre for paying off the Settlement Fund Trustee loan.
11. Copy of a letter dated 25th June 2001 addressed to the Senior Chief Mbakalo Location by the 2nd defendant to the effect that no person should claim the suit land.
12. Proceedings in BUNGOMA P & A CAUSE NO 97 OF 2002 in respect to the Estate of ONYAPIDI in which one MOSES OJALA ISIEPAI was the Petitioner while the 1st defendant and one ADAH AMOLI EMASE were the Objectors.

In the supporting affidavit, the plaintiff averred, inter alia, that following her marriage to **PATROBA** under Teso Customary Law on 21st August 1968 and which was later solemnized on 15th February 1981 in the Anglican Church, they lived with their nine (9) children on the suit land from 20th September 1974 at the invitation of **ONYAPIDI** who was father – in - law to **PATROBA**. Later, however, **ONYAPIDI** proposed to sell part of the suit land to **PATROBA** and by an agreement dated 31st May 1981, **PATROBA** purchased from **ONYAPIDI** five (5) acres out of the suit land at a consideration of Kshs. 9,500/=. At that time, the suit land measuring 6.6 Ha was registered in the names of **ONYAPIDI** who passed away on 9th August 1990. Thereafter, the suit land was registered in the name of the 2nd defendant to hold in trust for the other beneficiaries. After the demise of **ONYAPIDI**, however, **PATROBA** continued to pay the Settlement Fund Trustee loan and in consideration of that, the **ONYAPIDI** clan agreed to add **PATROBA** one (1) more acre out of the suit land and this was admitted by the 1st defendant in **BUNGOMA SUCCESSION CAUSE NO 97 OF 2002**. That on 16th February

1993, **PATROBA** received a copy of letter addressed to **ONYAPIDI** from the Settlement Fund Trustee in respect to the discharge of charge and transfer Certificate for the suit land. That the plaintiff and her family have and are still in occupation and possession of six (6) acres out of the suit land and therefore by 20th September 1986, the registered proprietor's interest in that portion had lapsed since the plaintiff and her late husband have extensively developed it by erecting houses and planting trees and various crops.

In opposing the Originating Summons, the 1st defendant filed a statement dated 13th February 2012 while the 2nd defendant filed both a replying affidavit and a statement also dated 13th February 2012.

In his statement, the 1st defendant **GODFREY EMURIA EMASE** stated, inter alia, that he is the Administrator of the Estate of **ONYAPIDI** but denied that **PATROBA** lived on the suit land peacefully or that he later purchased five (5) acres at a consideration of Kshs. 9,500/= on 31st May 1981 adding that the purported agreement is a forgery and a creation of the plaintiff as it is not signed. He added that **ONYAPIDI** only used to lease part of his land to **PATROBA** and even if there was any sale agreement, **PATROBA** didn't pay the balance of the purchase price. Further, that the agreement by which the **IKARUOKO** and **IKOMOLO** clans agreed to allocate **PATROBA** an additional one (1) acre out of the suit land was made in bad faith, is unlawful and not binding. In any case, the purported sale agreement between **PATROBA** and **ONYAPIDI** lapsed after six (6) months due to lack of the consent from the Land Control Board and this suit is time barred and all that the plaintiff is entitled to is a refund of the purchase price. That this suit lacks merit and is scandalous, vexatious frivolous and should be dismissed with costs.

In his replying affidavit whose contents were substantially repeated in his statement, **BOAZ ETYANG EDWACHI** the 2nd defendant averred, inter alia, that the suit land is registered in his names in trust for other beneficiaries. He too denied that **ONYAPIDI** had peacefully lived with **PATROBA** on the suit land or that the latter had on 31st May 1981 purchased five (5) acres thereof at a consideration of Kshs. 9,500/=. He added that the sale agreement dated 31st May 1981 is a forgery because **ONYAPIDI** used only to lease part of the suit land and even if the said agreement is valid, which he denied, **PATROBA** did not pay the balance of the purchase price. He also stated that the further agreement between the **IKARUOKO** and **IKOMOLO** clans purporting to allocate **PATROBA** an additional one (1) acre to increase his land to six (6) acres is a fraudulent document which is not binding since it was not signed by the defendants as the Administrators of **ONYAPIDI'S** Estate. He stated that even if there was any sale agreement between **ONYAPIDI** and **PATROBA**, it became null and void after six (6) months for lack of consent from the Land Control Board and this suit is therefore also time barred. This suit should therefore be dismissed with costs for being scandalous, vexations, frivolous and lacking in merit.

As part of their evidence, the defendants filed the following documents:-

1. Copy of title deed for the suit land.
2. Copy of transfer of land in Settlement Scheme from the Settlement Fund Trustee to **ONYAPIDI** dated 15th January 1993 in respect of the suit land.
3. Discharge of charge dated 15th January 1993 in respect of the suit land.
4. Copy of receipt No. 2684961 for Kshs. 250/= in the names of 1st defendant being conveyance fee dated 13th September 2011.
5. Copy of receipt No. 2326834 for Kshs. 500 in the names of 2nd defendant dated 21st September

2011.

6. Copy of receipt No. 2326831 for Kshs. 500/= in the names of 2nd defendant being registration fees dated 21st September 2011.

7. Copy of receipt No. 2486636 for Kshs. 1,000/= in the names of 2nd defendant dated 22nd September 2011.

8. Copy of receipt No. 2486638 in the names of ONYAPIDI for Kshs. 2,000/= being transfer of Settlement Scheme fees dated 22nd September 2011.

9. Copy of receipt No. 2486642 in the name of 2nd defendant for Kshs. 1,000/= dated 22nd October 2011 for title deed for the suit land.

10. Letter purported to have been written by the IKARUKO and IKOMOLO clans.

Directions having been taken, the trial commenced before **A. OMOLLO J** on 10th July 2014 when the plaintiff narrated how she and her husband **PATROBA** first entered the suit land in 1974 initially at the invitation of **ONYAPIDI** before they bought five (5) acres from **ONYAPIDI** who died before transferring the land as it was still under the Settlement Fund Trustee. Later, it was agreed that **PATROBA** be allocated one (1) more acre since he was the one who had paid the Settlement Fund Trustee loan. However, in 2011, the 2nd defendant tried to evict her and that was when she filed this suit after discovering that the 2nd defendant was the registered proprietor of the suit land.

The plaintiff called as her witnesses her son **KENETH OKWARA (PW 2)** and her brother-in-law **SHADRACK OKIRING (PW 3)**.

KENETH OKWARA (PW 2) told the Court how his father first entered the suit land as a relative of **ONYAPIDI** before he purchased five (5) acres and his family was subsequently added one (1) acre and now occupies (6) acres and it was not until 2011 that they discovered that the suit land is now registered in the names of the 2nd defendant.

SHADRACK OKIRING (PW 3) adopted as his evidence his statement dated 11th November 2011. In that statement, he has stated how in 1974 his cousin **PATROBA** was invited by **ONYAPIDI** to live on the suit land and in 1981, **ONYAPIDI** sold to him five (5) acres where **PATROBA** lived, and even after 1990 when **ONYAPIDI** died, **PATROBA** continued living on the suit land until 2011 when the plaintiff was threatened with eviction following the succession process. He added that the defendants brought surveyors who sub-divided the land and even agreed to add the plaintiff two (2) acres for taking care of the land.

The two defendants were the only witnesses for the defence.

GODFREY EMURIA EMASE (DW 1) told the Court that **ONYAPIDI** was their grandfather and was the registered proprietor of the suit land and both he and the 2nd defendant are the joint Administrators of his Estate. He asked the Court to adopt as his evidence his statement dated 13th February 2012 contents of which I have already summarized above.

BOAZ ETYANG EDWACHI (DW 2) also adopted as his evidence his replying affidavit and statements contents of which I have also already summarized above and I need not repeat here.

Submissions were thereafter filed both by **MS NATWATI** counsel for the plaintiff and **MS CHUNGE** counsel for the defendants.

I have considered the parties oral and documentary evidence as well as the submissions by counsel.

The plaintiff's case is premised on a claim for adverse possession. It is her case that she and her late husband **PATROBA** and their family have since 1974, lived on a portion measuring six (6) acres out of the suit land openly peacefully and exclusively until 2011 when the defendants tried to evict them. Her case is that **PATROBA** initially bought from the registered owner **ONYAPIDI** five (5) acres through a written agreement in 1981 and thereafter in 2000 the family of **ONYAPIDI** added them one (1) acre for having paid off the Settlement Fund Trustee loan. The plaintiff added that even **PATROBA** was buried on the portion that they occupy.

All that is resisted by the defendants who not only disown the agreement between **PATROBA** and **ONYAPIDI** by even add that this suit is in fact time barred.

It is common ground that the suit land which measures 6.6 Ha (approximately 16.3 acres) was originally registered in the names of the Settlement Fund Trustee on 22nd March 1983 before it was registered in the name of **ONYAPIDI** on 2nd October 1986. On 22nd September 2011 it was registered in the names of the 2nd defendant in trust for the 1st defendant and other beneficiaries. It is also clear from the Certificate of Confirmation of Grant issued by the **HIGH COURT BUNGOMA in SUCCESSION CAUSE NO 97 OF 2002** that the 1st defendant is the Administrator of the Estate of **ONYAPIDI**.

Although the defendants have disowned the agreement between **PATROBA** and **ONYAPIDI** dated 31st May 1981 by which the former allegedly bought five (5) acres out of the suit land at a consideration of Kshs. 9,500/= as being a forgery and in any event null and void for lack of consent, it is clear from the plaintiff's Originating Summons that her case is predicated on the claim of adverse possession having been in possession and occupation of six (6) acres out of the suit land since 1974. The plaintiff does not seek to enforce the agreement between **PATROBA** and **ONYAPIDI** dated 31st May 1981. In **KASUVE .V. MWAANI INVESTMENT LTD & OTHERS 2004 I KLR 184**, the Court of Appeal set out what a party claiming to be entitled to land registered in the name of another party through adverse possession must prove. It said:-

"In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition"

See also **WANJE V SAIKWA 1984 KLR 284**.

This suit is premised under **Section 38 of the Limitation of Actions Act** which entitles a person who claims to have become entitled by way of adverse possession to land registered under any of the Acts cited in **Section 37 of the Limitation of Actions Act** or land comprised in a lease to apply to the High Court for an order that he be registered as the proprietor thereof. It is now well settled that the combined effect of the relevant provisions of **Sections 7, 13 and 17 of the Limitation of Action Act** is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of twelve (12) years of the adverse possession – **BENJAMIN KAMAU & OTHERS .V. GLADYS NJERI C.A CIVIL APPEAL NO 2136 OF 1996**. It must also be remembered that possession of the land being claimed by the adverse possessor is a matter of fact to be observed on the land being claimed – **MAWEU .V. LIU RANCHING & FARMING CO-OPERATIVE SOCIETY LTD 1985 KLR 430**. In proving

that she and her family have been in occupation of six (6) acres out of the suit land, the plaintiff has averred as follows in paragraphs 16, 17, 18 and 19 of her supporting affidavit dated 4th November 2011.

16: ***“That the Applicant and her family was and are still in actual and continuous possession and in occupation of 6 acres of the said land parcel NO BUNGOMA/KIBISI/220”.***

17: ***“That by 20/9/1986, the registered owner’s proprietary interest had lapsed to the extend (sic) of the portion my husband and I occupy”.***

18: ***“That we have been residing and farming on the suit property 6 acres openly, peacefully, continuously and un-interrupted since 20/9/1974 to-date”.***

19: ***“That my late husband and I extensively developed the said portion of land by erecting houses and planted trees and various crops”.***

I do not think that the plaintiff’s claim that she and **PATROBA** first entered the suit land in 1974 at the invitation of **ONYAPIDI** who later sold them five (5) acres can be disputed by the defendants. There is clear and cogent evidence to prove that fact. Although the defendants have stated in their evidence that the agreement dated 31st May 1981 by which **PATROBA** purchased five (5) acres out of the suit land from their late grandfather **ONYAPIDI** is a forgery, no evidence was led by them to that effect except a mere allegation. Indeed both of them conceded in cross – examination that they were not privy to that agreement. Infact the 2nd defendant said he was young and still in school when the agreement was signed by the parties. The agreement itself, though written in Swahili language, is clear that **PATROBA** was purchasing five (5) acres and paid a deposit of Kshs. 9,500/= leaving a balance of Kshs. 5,500/=. It is not clear whether this balance was ever paid. However, there is no doubt that **PATROBA** and the plaintiff went into occupation of the suit land as far back as 1974 before they bought five (5) acres in 1981. Whereas **MS CHUNGE** for the defendants has submitted that the plaintiff is only entitled to 4 acres which was offered to her, there is no evidence that either **PATROBA** or the plaintiff was given 4 acres. The documentary evidence is that **PATROBA** bought five (5) acres in 1981. The agreement dated 31st May 1981 speaks for itself and nothing can be added or subtracted therefrom. The plaintiff’s occupation of five (5) acres of the suit land was indeed confirmed by the defendants themselves. This is what the 1st defendant said in cross – examination:-

“I was not a party to any agreement between PATROBA and ONYAPIDI ISEMEKI my grandfather. It is true that when I entered the suit land in 2002, I found the wife of PATROBA who is the plaintiff in this case was already living on the suit land”.

And the 2nd defendant said the following when cross – examined by **MS NATWATI**:

“I know that the plaintiff’s family occupies five (5) acres of the suit land to-date. The land is marked with a boundary. It is me who marked the boundary following the succession case. I am willing to give the plaintiff 4 acres because that is what she was given by my grandfather”.

There can be no doubt therefore about the plaintiff’s occupation and possession of five (5) acres of the suit land since 1974 first at the invitation of **ONYAPIDI** and later through a purchase in 1981. As I have already stated above, the suit land was previously registered under the Settlement Fund Trustee in 1983 before it was registered in the names of **ONYAPIDI** on 2nd October 1986. For purposes of adverse possession, a five (5) judge bench in the case of **GITU .V. NDUNGU & OTHERS C.A CIVIL APPEAL NO 304 OF 1997 (2001 eKLR)** held that the period when land was under the Settlement Fund Trustee is not to be considered in computing time for purposes of the Limitation period. The Courts went on to hold

that the decision in the case of **ELIUD NYONGESA LUSENEKA & ANOTHER .V. NATHAN WEKESA OMOCHA C.A CIVIL APPEAL NO 134 OF 1993** which had decided otherwise was wrong. Instead, the Court agreed with the decision in **BONFACE OREDO .V. WABOMBA MUKILE C.A CIVIL APPEAL NO 170 OF 1989** where it was held that the interest of the Settlement Fund Trustee in land under dispute is not extinguishable under the Limitation of Action Act. In the circumstances of this case, time for purposes of the limitation period must therefore be computed from 2nd October 1986 when the suit land was registered in the names of **ONYAPIDI** and not from 1974 when **PATROBA** and the plaintiff entered the suit land. In any event, when **PATROBA** first entered the land in 1974, it was at the invitation of **ONYAPIDI** and there can be no adverse possession when the party claiming has entered the land in dispute at the invitation of the owner. The agreement between **PATROBA** and **ONYAPIDI** dated 31st May 1981 did not have any completion date. The defendants have stated in their evidence that the consent of the Land Control Board was not obtained and therefore the agreement became null and void six (6) months after the date the said agreement was executed. That would mean therefore, going by the defendants own evidence, that the suit land was agricultural land and subject to the provisions of the Land Control Act which provides that unless the consent of the Land Control Board is sought within six months of the making of the agreement, it shall become void. In that case, time for purposes of adverse possession would start to run six (6) months from 31st May 1981 when **PATROBA** and **ONYAPIDI** signed the agreement for sale of five (5) acres out of the suit land – **SAMUEL MIKI WAWERU V JANE NJERI RICHU C.A CIVIL APPEAL NO. 122 OF 2001**. In this case however, as I have already found that prior to 2nd October 1986 the suit land was registered in the names of the Settlement Fund Trustees, it is clear that time for purposes of adverse possession can only be computed from 2nd October 1986 when it was registered in the names of **ONYAPIDI**. By that time, the agreement between **PATROBA** and **ONYAPIDI** had long become null and void for lack of the necessary consent from the Land Control Board but neither **ONYAPIDI** nor his successor in title who is the 2nd defendant took any action towards asserting their ownership of the portion occupied by **PATROBA** and his family. There is no evidence that either **ONYAPIDI** or the 2nd defendant filed any suit against **PATROBA** or the plaintiff seeking their eviction from the suit land or any portion thereof until 2011 when the defendants threatened the plaintiff with eviction but even then, it was not through any orders of the Court. Instead, the plaintiffs were summoned by the Assistant Chief on 8th November 2011 and told to vacate at the instigation of the 2nd defendant. That was not sufficient because if the time is computed from 1986 when the suit land was registered in the names of **ONYAPIDI**, the plaintiff and her family had by then lived on the suit land for some twenty five (25) years well beyond the statutory period of twelve (12) years that entitled them to claim the portion that they were occupying. There is nothing to suggest that the plaintiff's occupation of the portion of the suit land was not open, exclusive, un-interrupted and with the knowledge of the defendants. The mere change of ownership of the suit land from **ONYAPIDI** to the 2nd defendant on 22nd September 2011 did not interrupt the plaintiff's possession of the five (5) acres that she and **PATROBA** had occupied since the aborted sale agreement of 31st May 1981 – **GITHU .V. NDEETE 1984 KLR 776**.

What I have agonized over in this judgment is whether the plaintiff is entitled to six (6) acres out of the suit land as she claims or five (5) acres as per the sale agreement between **PATROBA** and **ONYAPIDI** dated 31st May 1981 or the four (4) acres which the defendants appear to be prepared to give her. From the evidence available, I have no doubt that **PATROBA** and his family first occupied five (5) acres of the suit land in 1974 at the invitation of **ONYAPIDI** who later in 1981 sold him that portion through a botched agreement. **PATROBA** and his family nonetheless remained in possession and occupation of the said five (5) acres in a manner that was clearly adverse to the interest of both **ONYAPIDI** and his successor in title who is the 2nd defendant. It was not until 21st December 2000 that the parties **IKARUOKO** and **IKOMOLO** clans decided to add the plaintiff an additional one (1) acre in consideration of the fact that **PATROBA** had paid off the Settlement Fund Trustee loan in order to have the suit land discharged. This was however disputed by the defendants. The plaintiff herself conceded in her evidence that she only took possession of the extra one (1) acre in 2000. This is what she said in her evidence in Chief when

she testified before **A. OMOLLO J** on 14th July 2014:

"I have lived on the land from 1974 on the 5 acres and 2000 on the acre".

The plaintiff was therefore confirming the contents of agreement dated 21st December 2000 which was entered into between the **IKARUOKO** and **IKOMOLO** clans to allocate the plaintiff one (1) more acre to increase her land to six (6) acres. Notwithstanding any noble intentions that the two clans may have had in increasing the plaintiff's land to six (6) acres, that agreement has no force of law for the simple reason that by that time, the suit land was still registered in the names of **ONYAPIDI** who had died on 9th August 1990 and the two clans had no capacity to alienate his land. They were simply meddling with the Estate of a deceased person. The plaintiff cannot rely on that agreement to claim the extra one (1) acre out of the suit land. Secondly, having gone into occupation of the extra one (1) acre in 2000, as she had confirmed in her oral evidence, the twelve (12) years limitation period was yet to expire by the time she filed this suit in November 2011. She cannot therefore claim the one (1) additional acre out of the suit land either as a gift from the two clans as they had no capacity to donate it to her or through adverse possession since she had only been in occupation of the additional one (1) acre for eleven (11) years which is one (1) year short of what is prescribed in the law on adverse possession. I have no doubt however that the plaintiff's claim to five (5) acres out of the suit land by way of adverse possession is well merited. I must therefore allow it.

Before I do so, I must also determine whether any orders can be made against the 1st defendant **GODFREY EMURI EMASE**. A claim for adverse possession is against the registered proprietor of the land in dispute. **Section 38(1) of the Limitation of Actions Act** reads:-

"Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 or land comprised in a lease registered under any of three Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land". Emphasis added

As the suit land is no longer registered in the names of **ONYAPIDI**, it was not necessary to sue this Administrators of his Estate. The only person against whom orders in adverse possession can be made is the 2nd defendant who is the current registered proprietor of the suit land as per the copy of title deed issued on 22nd September 2011 and which is part of the defendant's documents. The claim against the 1st defendant must therefore be dismissed.

Ultimately therefore, judgment is entered for the plaintiff against the 2nd defendant **BOAZ ETYANG EDWACHI** in the following terms:-

- 1. An order is made that the plaintiff has become entitled to five (5) acres out of the land parcel NO BUNGOMA/KIBISI/220 by way of adverse possession.**
- 2. The 2nd defendant to execute all the relevant documents to facilitate the transfer of five (5) acres out of land parcel NO BUNGOMA/KIBISI/220 to the plaintiff within 30 days of the delivery of this judgment.**
- 3. In default of (2) above, the Deputy Registrar of this Court shall be at liberty to execute all relevant documents on behalf of the 2nd defendant to facilitate such transfer.**
- 4. The claim against the 1st defendant is dismissed.**

5. As the parties are family, each shall meet their own costs.

Boaz N. Olao.

JUDGE

27th March 2019.

Judgment dated, delivered and signed in open Court this 27th day of March 2019 at Bungoma

Ms Natwati for plaintiff present

Mr. Wekesa for Ms Change for defendant present

1st defendant present

2nd defendant present

Boaz N. Olao.

JUDGE

27th March 2019.



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